2000

Betty J. Nelson v. Perry A. Peterson : Brief of Respondent

Utah Supreme Court

Hansen and Orton; Beneficial Life Tower; Raymond A. Hintze; Attorneys for Appellant.
Ray R. Christensen; Christensen, Gardiner, Jensen and Evans; Attorney for Respondent; John H. Snow; Worsley, Snow and Christensen; Attorney for Respondent.

IN THE SUPREME COURT

OF THE STATE OF UTAH

BETTY J. NELSON, :

Plaintiff and Appellant, :

vs. : Case No. 13803

PERRY A. PETERSON, M.D., et al, :

Defendants and Respondents.:

BRIEF OF RESPONDENT VALLEY WEST HOSPITAL DEVELOPMENT CORPORATION dba VALLEY WEST HOSPITAL

Appeal from the Judgment of the Third District Court for Salt Lake County
Honorable Bryant H. Croft, District Judge

RAY R. CHRISTENSEN
Christensen, Gardiner,
Jensen & Evans
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Respondent
Valley West Hospital
Development Corporation,
dba Valley West Hospital

HANSEN & ORTON
Beneficial Life Tower
36 South State Street
Salt Lake City, Utah 84111

JOHN H. SNOW
Worsley, Snow & Christensen
Continental Bank Building
Salt Lake City, Utah 84101
Attorney for Respondent
Perry A. Peterson, M.D.

RAYMOND A. HINTZE
Suite #273, Cottonwood Mall
4835 Highland Drive
Salt Lake City, Utah 84117
Attorneys for Appellant

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IN THE SUPREME COURT

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BETTY J. NELSON, :

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vs. : Case No. 13803

PERRY A. PETERSON, M.D., et al, :

Defendants and Respondents.:

BRIEF OF RESPONDENT VALLEY WEST HOSPITAL DEVELOPMENT CORPORATION dba VALLEY WEST HOSPITAL

STATEMENT OF THE CASE

This is a malpractice suit by plaintiff, wherein she claims that negligence upon the part of defendant doctor and defendant hospital caused a stillbirth of her baby.

DISPOSITION IN THE LOWER COURT

A jury returned a verdict in favor of both defendants against the plaintiff no cause of action.

RELIEF SOUGHT ON APPEAL

Defendants seek affirmance of the judgment below.

STATEMENT OF FACTS

The Statement of Facts contained in plaintiff's brief is not complete and ignores the time-honored rule that on appeal from a judgment on a jury verdict, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the prevailing party, in this case the defendants. We, therefore, deem it necessary to restate the facts.

Plaintiff was a maternity patient of defendant Dr. Peterson. Her pregnancy proceeded essentially uneventfully until September 2, 1971. On this date she was overdue for delivery, and was examined by Dr. Peterson in his office. He performed both an external and internal examination and advised her that she was ready for delivery, and that she should proceed promptly to the hospital where labor would be induced. (R. 338) Dr. Peterson also called the defendant hospital and gave instructions to prepare the plaintiff for induction. (R. 247, 324, 404)

Plaintiff left Dr. Peterson's office in downtown Salt Lake at about 4:00 p.m. There was a dispute in the evidence as to whether she proceeded directly to the defendant hospital or whether she stopped at her home for some

personal supplies before going to the hospital. (R. 339-340, 392, 394) In any event, she arrived at the hospital at 4:42 p.m. (Ex. 1) She was not at this time in active labor. (R. 341, 352, 356-357, 364) Since she had been in the hospital a couple of days earlier in false labor, it was not necessary that she be "prepped," but she was given all of the other routine treatment on admission, including an external examination by the nurse (vital signs), an enema was administered, and fetal heart tones were heard and found to be normal. (R. 340, 364, 396, Ex. 1)

At the time of her arrival at the hospital, there was a complicated delivery taking place in the delivery room, and the O.B. nurse was primarily occupied with that. (R. 364, 408-409, 422-423) Plaintiff was accompanied by her sister, Jeanette Rex (R. 352, 368), and she had available at her bedside a call button. (R. 407) At no time did she make any complaint of pain or discomfort, nor did she seek the assistance of any hospital personnel. (R. 328, 341, 352, 356-357, 363, 406, 429-430)

The delivery which was in progress in the delivery room was completed around 6:30 p.m., and the nurses then started to prepare the infusion pump for induction of

labor. (R. 341, 365) Some difficulty was encountered with the equipment, and eventually one of the nurses called the head O.B. nurse for advice as to the problem. At about this time, Dr. Peterson arrived, and either he or Nurse Rhoads got the machine operating properly. (R. 344, 366, 413) Dr. Peterson then made a vaginal examination and discovered that there was a prolapsed cord, and he was unable to hear any fetal heart tones and concluded that the baby had died. (R. 344-345) The baby was ultimately stillborn at about 8:31 p.m. (Ex. 1)

The only evidence offered by the plaintiff of any negligence upon the part of defendant hospital was the testimony of Dr. Harris. Dr. Harris testified that he had never practiced at Valley West Hospital and was not familiar with its staff or its capabilities. (R. 293) However, he stated that the standard of care in Salt Lake hospitals would be for a newly-admitted maternity patient to have both an abdominal and vaginal examination and to listen for fetal heart tones. (R. 295) The purpose of the vaginal examination would be to determine the status of the cervix, the condition of the membranes and any protruding parts which could be palpated. (R. 295)

On cross-examination he admitted that the standard operating procedures are determined by the hospital staff members of the specialty involved. (R. 307) He admitted that an external examination was done in this case and that fetal heart tones were heard and were within normal range. (R. 308, 310) The only thing not done at the time of admission was a vaginal examination. If the patient came directly to the hospital from the doctor's office (as was the case here), there would be no need for a vaginal examination. (R. 308)

Even if a vaginal examination had been performed, there was no assurance that the nurse would have discovered that the amniotic membrane had ruptured. This is sometimes a difficult determination even for a doctor. (R. 309) There could be pressure on the cord from the baby's head, even before prolapse, and this could not be discovered by a vaginal examination. (R. 311) He further admitted that even if the prolapse of the cord occurred before plaintiff's arrival at the hospital, and if it could have been discovered upon vaginal examination at the time of admission, it was speculative whether the baby could have been saved. (R. 312-313)

Thus, according to the testimony of plaintiff's own expert, the only thing omitted by the hospital which is usually done at the time of admission was a vaginal examination, and in view of the fact that plaintiff had just left her doctor's office, that was not indicated. Even if it had been performed, it was speculative as to whether the outcome would have been any different. (R. 312 and 313) As left on cross-examination, Dr. Harris' testimony did not make a prima facie case of negligence, and left to speculation whether anything the hospital might have done could have affected the ultimate outcome.

Defendant Dr. Peterson testified that whether a vaginal examination should be done upon admission to the hospital, in the absence of instructions from the doctor, depends upon the judgment of the nurses. (R. 245, 276) In some cases the doctor may request it. In this instance, Dr. Peterson gave no such instructions and there was no reason to do so. (R. 245-246) When Dr. Peterson called the hospital to arrange for plaintiff's admission, he advised that the bag of waters was bulging, but had not yet ruptured, and that plaintiff was not in labor. (R. 274) He also testified, in harmony with Dr. Harris,

that the purpose of a vaginal examination is to determine the status of the cervix, and that sometimes it is difficult even for doctors to determine whether the amniotic membrane has ruptured. A nurse might not make that determination even if she performed a vaginal examination. (R. 275)

Dr. Peterson had no opinion as to when the prolapse of the cord occurred. It could have occurred at any time from the time the patient left his office until the time he saw her at the hospital approximately three hours later. (R. 277) There is no assurance that an examination would have discovered the prolapse of the cord. Death of the baby could have occurred before the prolapse. It could have occurred before the time that the most skilled doctor could have discovered the prolapse. If the prolapse had been discovered, the doctor should have been notified. In this instance, he could not have taken effective action in much less than an hour. In this time the baby could have expired. (R. 277-278)

He also testified that the hospital had performed all of his routine orders up to the time of the birth. (R. 280, 396) Had he desired further activity on the part

of hospital personnel, he would have called the hospital and directed it. (R. 396) Since the patient had just come from the doctor's office to the hospital and since she was not in active labor and was waiting for induction, the nurses had no occasion to examine her. (R. 396, 397)

In summary, there was substantial evidence supporting the jury's finding that defendant hospital had conformed to the standard of care of hospitals in this community, and there was no competent evidence from which a jury could find that, even if there had been a departure from the standard of care, that such probably caused the death of plaintiff's unborn baby.

At the outset of the trial, plaintiff's attorney made a motion in limine which was granted in part, and counsel for the defendants were ordered not to refer to the illegitimacy of the pregnancy or to the fact that plaintiff was on welfare. (R. 200-206) However, by inadvertence during the cross-examination of Dr. Peterson, he volunteered both that the plaintiff was on welfare and that the pregnancy was illegitimate. (R. 268) Plaintiff's counsel immediately made a motion for mistrial, which was extensively argued to the court. The court denied the

motion for mistrial and concluded that he had erred in ruling on the motion in limine, and that it was proper to prove the illegitimacy of the pregnancy and plaintiff's status as a welfare patient, which were relevant on the issue of damages. (R. 268-273)

Both defendants made motions for directed verdict at the end of plaintiff's case (R. 372-390) and again at the conclusion of all of the evidence. (R. 437-438) These motions were taken under advisement. (R. 438) The case was submitted to a jury, which returned with an unanimous defense verdict for both defendants. (R. 18, 456) A subsequent motion for new trial was denied, (R. 9-10, 15-16) and this appeal followed. (R. 5-7)

ARGUMENT

POINT I

THE VERDICT IS FULLY SUPPORTED BY THE EVIDENCE AND THERE IS NO EVIDENCE WHICH WOULD SUPPORT A PLAINTIFF'S VERDICT.

Without so much as a single citation of authority, and based solely upon a review of the record in the light most favorable to the plaintiff, her attorneys contend that the verdict in this case is unsupported by the weight of the evidence. Plaintiff argues:

1. That defendant hospital should have performed an abdominal and vaginal examination upon plaintiff's admission to the hospital.

Answer: The hospital did perform an abdominal examination. (R. 308, 310, 340, 364, 396, Ex. 1) While Dr. Harris testified that it was the standard of care in this community to perform a vaginal examination upon admission, he admitted on cross-examination that such was not necessary in this case, since the plaintiff had had a vaginal examination at her doctor's office immediately before her admission to the hospital. (R. 308) Dr. Peterson testified that in the absence of directions from the attending physician, it was a matter of judgment upon the part of the nurses as to whether a vaginal examination should be done upon admission to the hospital, and that under the facts of this case, a vaginal examination was not indicated. (R. 245-246, 276, 396, 397)

2. The standard of care requires an abdominal and vaginal examination prior to induction of labor.

Answer: Labor was not induced until Dr. Peterson arrived at the hospital. Although the nurses had been working with the infusion pump prior to his arrival, they had

not been successful in getting it to operate. (R. 344-345, 366, 413) Plaintiff was receiving only glucose solution and no medication from the equipment prior to the time of Dr. Peterson's arrival. (R. 411-412) Dr. Peterson performed a vaginal examination immediately after the equipment started to operate. (R. 344-345) Plaintiff's expert, Dr. Harris, agreed that this would satisfy the standard of care of the community. (R. 311-312)

3. The standard of care requires hospital personnel to inquire of the patient upon admission whether her water has broken.

Answer: It is speculative at best as to whether such an inquiry would have elicited any reliable information. At the trial, plaintiff testified that she did not know when her bag of waters broke. (R. 367) At the time of the incident, she told Dr. Peterson that she experienced a gush of fluid from the vagina while she was at home, between her examination by Dr. Peterson and her admission to the hospital. (R. 392, 394, 427, Ex. 1) However, at trial, plaintiff denied that she went home between the time she left Dr. Peterson's office and the time she arrived at the hospital. (R. 339-340)

The problem of causation is even more tenuous. Dr. Harris admitted on cross-examination that it was speculative (1) whether the cord had prolapsed at the time of plaintiff's admission to the hospital (R. 309); (2) whether it would have been discovered by a vaginal examination by a nurse even if it had prolapsed (R. 309); and (3) whether, under the circumstances, the baby could have been saved even if a prolapsed cord had been discovered upon admission to the hospital. (R. 312-313) The testimony of a witness is no stronger than it is left on cross-examination. Edwards v. Clark, 96 Utah 121, 83 P.2d 1021.

While our research has discovered no cases closely similar in point of fact, we believe that the cases discussed below establish the applicable law:

In Edwards v. Clark, 96 Utah 121, 83 P.2d 1021, a young mother died following childbirth. The court held that the doctrine of res ipsa loquitur was not applicable in an obstetric case. The court likewise held that a verdict could not be based on conjecture or speculation. Said the court:

> ". . . A verdict of a jury may not be based on such conjectures. Peterson v. Richards, 73 Utah 57, 272 P. 229; Baxter v. Snow, 78 Utah 217, 2 P.2d 257.

> "In order to recover in such case the plaintiff must show that in treatment of the patient the defendant physician did not exercise such care and diligence as is ordinarily exercised by skilled physicians doing the same type of work in the vicinity, and that the want or failure of the required skill and care was the cause of the injury complained of. That there might have been neglect or lack of skill is not enough. To permit a cause to go to the jury on testimony showing only possibility, or what might or could have happened, is to permit a jury to base a verdict upon conjecture, speculation or suspicion." (Emphasis added.)

In Moore v. D. & R.G.W. Railroad Company, 4 Utah 2d 255, 292 P.2d 849, plaintiff's doctor testified that it was "possible" that plaintiff had a herniated disc. This court held that the trial court committed error in refusing to take from the consideration of the jury the issue of whether plaintiff had a herniated intervertebral disc. This court held that under that evidence the existence of a herniated disc was at best speculative and a verdict could not be based upon such evidence, and the verdict and judgment were reversed.

To the same effect see Jackson v. Colston, 116 Utah 295, 209 P.2d 566.

In the case of Joseph v. W. H. Groves Latter-Day Saints Hospital, 10 Utah 2d 94, 348 P.2d 935, this court

affirmed a defense verdict and judgment in a suit against a hospital, saying:

> "What the parties are entitled to and the law seeks to afford is an opportunity for one claiming a grievance which would justify legal redress to present it to a court or jury and to have a fair trial. When this is done, and the verdict and judgment are entered, all presumptions are in favor of their validity. The burden is upon the appellant not only to show that there was error, but that it was prejudicial to the extent that there is reasonable likelihood that in its absence there would have been a different result. We find no such error here."

That language is fully applicable here.

At the top of page 5 of plaintiff's brief, it is argued "that the hospital and/or doctor breached the standard of care in the community . . ." This is a claim which smacks of res ipsa loquitur. A similar argument was rejected in the case of Talbot v. W. H. Groves' Latter-Day Hospital, 21 Utah 2d 73, 440 P.2d 872. This court specifically rejected the doctrine of res ipsa loquitur as against a hospital and two doctors, where plaintiff failed to show which of the defendants was in charge of the offending instrumentality, or the management of the case, at the time plaintiff's injury occurred. In Denny v. St. Mark's Hospital, 21 Utah 2d 189, 442 P.2d 944, this court held

that there was no competent evidence to support a finding that plaintiff was injured as a result of manipulation of her body while X-rays were being taken, and affirmed a directed verdict for the defendant.

Not only is the jury's verdict adequately supported by the evidence, but in fact there is no competent evidence which would support a verdict in favor of the plaintiff. The respective motions of the defendants for directed verdict should have been granted, and the judgment below should be affirmed.

POINT II

THE COURT DID NOT ERR IN RECEIVING TESTIMONY AS TO THE PATERNITY AND ILLEGITIMACY OF PLAINTIFF'S STILLBORN CHILD.

Again, without any citation of authority, plaintiff urges that the court erred in permitting evidence concerning the identity of the father of the stillborn child, and of the child's illegitimacy. As noted in our Statement of Facts, the court at the outset of the trial granted plaintiff's motion in limine, prohibiting defense counsel from inquiring into the paternity and legitimacy of the baby. By inadvertence, the fact of the baby's illegitimacy came out in an answer by Dr. Peterson to a

question propounded by counsel for the hospital. Plaintiff's counsel immediately moved for a mistrial, and at this point the matter was re-argued. The judge then became convinced that, in view of plaintiff's claims for mental anguish arising out of the stillbirth, all of the facts surrounding the pregnancy became relevant and material and that, in fact, defendants would have been unfairly prejudiced if such evidence had been suppressed.

Under Rule 45, Rules of Evidence, the trial judge is vested with a wide discretion in weighing the relevance of evidence as against any collateral prejudicial or distracting effect that it may have. In the absence of a showing of abuse of that discretion, such rulings cannot be held to be erroneous.

Here the court clearly weighed the conflicting considerations, and concluded that, on balance, the probative value of the evidence outweighed any inflammatory or other improper effect that it might have. The ruling was a considered one, after extensive argument to the court both at the outset of trial and again on the motion for mistrial. Plaintiff has advanced neither facts nor legal authority which would support a holding that the judge

abused his discretion or committed error in receiving the questioned evidence.

POINT III

THIS STATE DOES NOT RECOGNIZE AN ACTION FOR THE WRONGFUL DEATH OF AN UNBORN CHILD.

We do not believe that the court will reach Point III. If defendants' position under Points I and II is sustained, Point III becomes moot.

We recognize that in recent years a line of authority has developed supporting the principle that an unborn but viable fetus is a legal person, and that legal action may be maintained either by it for prenatal injuries or by its parents for prenatal death. However, these holdings are not the tidal flood which they are painted to be by plaintiff's counsel.

Many respected courts of last resort continue to adhere to the traditional rule, that an unborn child is not a legal person, and that no action will lie for its wrongful death. California and New York, two of the most liberal jurisdictions in the country, continue to adhere to this principle. Bayer v. Suttle, 23 Cal. App. 3d 361, 100 Cal. Rptr. 212; Endresz v. Friedberg, 24 N.Y.2d 478, 301 N.Y.S.2d 65, 248 N.E.2d 901. The highly respected

Supreme Judicial Court of Massachusetts also adheres to this view. Leccese v. McDonough, (Mass.) 279 N.E.2d 339.

The Supreme Court of North Carolina in Gay v. Thompson, 266 N.C. 394, 146 S.E.2d 425, placed its decision on the highly practical ground that there can be no evidence from which to infer a pecuniary injury resulting from the wrongful prenatal death of a viable fetus. Said the court:

> " . . . We have based our decision on the ground there can be no evidence from which to infer 'pecuniary injury resulting from' the wrongful prenatal death of a viable child en ventre sa mere; it is all sheer speculation. Consequently, it is not necessary for us to decide in this case the debatable question as to whether a viable child en ventre sa mere, who is born dead, is a person within the meaning of our wrongful death act. See Graf v Taggert, supra, at p.143 of 204 A2d 140." (Emphasis added.)

Other cases wherein recovery has been denied are: Stokes v. Liberty Mutual Insurance Company (Fla.), 213 So.2d 695; McKillip v. Zimmerman, (Iowa), 191 N.W.2d 706; Chrisafogeorgis v. Brandenberg, (Ill. App.) 279 N.E.2d 440; Drabbels v. Skelly Oil Co., 155 Neb. 17, 50 N.W.2d 229; Graf v. Taggert, 43 N.J. 303, 204 A.2d 140; Padillow v. Elrod (Okla.), 424 P.2d 16; Durrett v. Owens, 212 Tenn. 614, 371 S.W.2d 433; and Lawrence v. Craven Tire Company,

210 Va. 138, 169 S.E.2d 440. Analogous to these cases is State v. Dickinson (Ohio), 263 N.E.2d 253, holding that a viable unborn fetus is not a person within the meaning of the automobile homicide statute.

Although the case of Webb v. Snow, 102 Utah 435, 132 P.2d 114, is not strictly in point since it does not involve a viable fetus, the language of this court in that case appears to be pertinent:

> " . . . While injuries resulting in a miscarriage are actionable, and compensation may be awarded for the physical and mental sufferings experienced by a woman who has a miscarriage by reason of injuries caused by the wrongful acts of others, damages are not awarded for 'loss of the unborn child' itself."

We respectfully suggest that that language would be equally appropriate to the facts of this case, and that this court would remain in good judicial company by adhering to the traditional rule.

CONCLUSION

Plaintiff had a full and fair trial upon the merits of her case which was determined by a jury. All presumptions are now in favor of the validity of the proceedings below. Plaintiff has demonstrated no error and

indeed has failed to establish even a prima facie case. She received all that she was entitled to and more in the trial court. The judgment should be affirmed.

Respectfully submitted,

RAY R. CHRISTENSEN
Christensen, Gardiner,
Jensen & Evans
900 Kearns Building
Salt Lake City, Utah 84101
Attorney for Respondent
Valley West Hospital
Development Corporation,
dba Valley West Hospital

CERTIFICATE OF SERVICE

I hereby certify that the foregoing respondent's brief was served on Hansen & Orton, Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, and Raymond A. Hintze, Suite #273, Cottonwood Mall, 4835 Highland Drive, Salt Lake City, Utah 84117, attorneys for appellant; and on John H. Snow, attorney for respondent Peterson, 7th Floor, Continental Bank Building, Salt Lake City, Utah 84101, by mailing two copies thereof, postage prepaid, on the _____ day of May, 1975.

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